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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 268

HORACE TURNER, PETITIONER

v.

UNITED STATES OF AMERICA AND STATE OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 444-475) is reported, *sub nom. United States* v. *Property on Pinto Island,* at 74 F. Supp. 92. The opinions of the Court of Appeals for the Fifth Circuit (R. 753-765 have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1949 (R. 765). The petition for a writ of certiorari was filed on August 15, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The United States sought to establish its right to certain filled lands on Pinto Island, surrounded by inland navigable waters in Alabama. It based its claim upon a deed from the State executed in 1933. Petitioner Turner claimed the land on the basis of a deed from the United States in 1859. The questions presented are:

1. Whether title to lands in Alabama, below ordinary high-water mark and surrounding an island situated in inland navigable tidal waters, is vested in the State of Alabama, and whether a patent issued by the United States to land in such navigable tidal waters can convey title below the ordinary high-water mark as against the State.

2. Whether, in Alabama, the artificial filling in of submerged land in navigable waters below ordinary high-water mark ripens into title as against the State of Alabama or its grantees.

STATEMENT

On October 21, 1941, the United States, pursuant to the request of the Maritime Commission, filed a petition to condemn certain land near Mobile, Alabama, for the construction of facilities to be used for the building of ships and the operation of such facilities (R. 2). An order granting immediate possession was entered on the same date (R. 8).

The land described in the petition, known as Parcel 2 (Govt. Ex. 8, R. 81-82), consists of 72.6 acres of reclaimed land located at the southern end of the present Pinto Island, which is surrounded by the inland navigable waters of Mobile River to the

west, Mobile Bay to the south and east, and Pinto Pass to the north. The land lies directly across Mobile River from the City of Mobile (R. 444).

On July 26, 1943, Horace Turner, petitioner herein, filed an answer and claimed title to the land sought to be condemned (R. 17-20, 77-79). Petitioner's claim was based upon ownership of a small part of fast land which was increased by artificial fill. This fast land was acquired through mesne conveyances dating from a patent issued by the United States in 1859. On April 20, 1945, the United States amended its petition asserting title in the United States to all, or at least a part, of the land involved (R. 31). This claim was based (1) on a deed to the United States in 1933 from the State of Alabama granting to the United States the land of Pinto Island formed as a result of artificial fill (R. 368), and (2) on the fact that the land was "in whole or in part burdened with the navigation servitude" held by the United States (R. 32, 72-74). Although the State of Alabama, the other party involved, asserted title in itself in the trial court, the State on appeal recognized the claim of the United States, as the grantee of the State under the deed executed in 1933.

The case was referred by the district court to a special master for the purpose of determining title, and the evidence presented to the special master dealt with (1) the location of any fast land, i.e., land above mean high tide, of the original Pinto Island with respect to the boundaries of Parcel 2 located on the southern end of the present Pinto

Island and (2) the filling in and formation of Parcel 2.

The evidence was undisputed at the hearing that the original Pinto Island was a prong-shaped body of land or "wish bone" (R. 103, 110-111). The general outline of the island as of March 1, 1859, when the United States issued a patent for the island to the heirs of Antonio Pinto, is shown on the plat attached to the patent (Pet. Ex. 2, R. 155). The area patented in 1859 contained 42.75 acres. By 1904, when petitioner purchased a very small portion, the island had eroded in part. Pursuant to a permit from the Secretary of War, petitioner in 1906 constructed an open wharf and dredged between the wharf and the channel of Mobile River to a depth of 22 feet (R. 82, 356-360). The special master made the following findings: The first 100 feet of petitioner's wharf, which extended approximately 700 feet along the 1904 harbor line, were constructed on fast land of the petitioner containing less than 1/5 of an acre, and the remainder of the wharf projected into the water away from his land and to the east over lands of Mobile Bay submerged at mean high tide. In consideration for the dredging of the river, petitioner conveyed the north one-half of his property to the Home Dredging Company in 1908, which conveyance included the 1/5 of an acre on which the first 100 feet of the wharf was constructed. The remaining fast land owned by petitioner, which was located west of the wharf, was removed through the dredging operations of petitioner in order to accommodate ships coming

up to the wharf. The spoil from dredging Mobile River to the west of the wharf was deposited east of the wharf and entirely away from the original Pinto Island, including the land purchased by petitioner, in the shallow waters of Upper Mobile Bay. The petitioner continued filling in the submerged lands of Mobile Bay by permitting ships to deposit ballast until 1916, and thereafter the filling in was extended by the vast deposits of spoil by the United States from dredging Mobile River (R. 46-49, 56, 392, 393, 395).

The special master also found that Parcel 2 is located outside of the boundaries of the original Pinto Island and was created entirely by filling in the submerged lands of Mobile Bay below high-water mark. Of this area, 63.10 acres were created by the deposit of dredgings by the United States and 9.5 acres by the deposit of dredgings and ballast by the petitioner (R. 56, 396-397).

Petitioner testified that at the time he deposited spoil from the dredging he was not interested in the land created by fill but only in the wharf bordering the navigable channel of Mobile River (R. 170-171, 180-181, 186-187). He further testified that he used the wharf for a period of only about four years and abandoned it when he established docks across the river in the City of Mobile. The wharf was damaged by a hurricane in 1916, and by 1934 the top of the wharf had rotted away (R. 177, 187, 214-215).

The district court found it impossible to determine how much fast land of the original Pinto

Island was retained by petitioner after his conveyance to the dredging company and its location with respect to the boundaries of Parcel 2. The trial court did find, however, that the area grew from a very small one to 72.6 acres, formed in major part as a result of filling in the submerged lands of Mobile Bay (R. 457).

The trial court held that the petitioner was entitled to compensation for all of the area of Parcel 2; that the United States and the State of Alabama had the burden of establishing title and had failed to overcome such burden; that title to tidelands in this area did not vest in the State of Alabama upon its admission into the Union in 1819; and that, assuming the State owned the submerged land, the extension of uplands by fill carried title out from the original to the new-made land, whether the fill was made by the upland owner or another (R. 462-474).

Thereafter, the case proceeded to a valuation trial, resulting in a judgment in the amount of $60,650.00 (R. 736).

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and held that title to submerged lands in the navigable tidal waters of Mobile Bay, no matter how shallow, is vested in the State of Alabama, and that filling in such submerged lands does not ripen into title as against the State or its grantees. The case was remanded to the district court with instructions to "determine precisely the part of the land taken which was true fast land,

that is originally fast land or formed by accretion, and what part of the fund awarded for the whole should be awarded to Turner" (R. 758). In its opinion, the court said that a "careful examination of the record, in the light of the findings of master and judge, convinces us that the evidence establishes beyond dispute: that nearly, if not quite, all of the land sought to be condemned is not true fast land but is land made by filling submerged land, that is land subject to tidal flow; and that if any of it at the time of the taking was natural fast land, it was only a small part" (R. 756).

ARGUMENT

1. Petitioner bases his claim of title to Parcel 2 on two theories. He first contends that the patent issued by the United States in 1859 to the heirs of Antonio Pinto conveyed title to lands below high-water mark, because such lands were waste and unappropriated lands of the United States which did not vest in the State of Alabama upon its admission into the Union in 1819. This contention is without support. It is settled that the states, upon being admitted into the Union, became vested with title to lands underlying inland navigable waters.[1] *Shively* v. *Bowlby,* 152 U. S. 1, 26. It is also settled that the State of Alabama, upon its admission into the Union in 1819, became vested with title to the soil under navigable waters, where the tide ebbs and flows, up to ordinary high-water mark. *Mobile*

[1] This result is to be contrasted with the holding that rights in the submerged lands along the open coast and outside of the inland waters are vested in the United States. *United States* v. *California,* 332 U. S. 19.

Transportation Co. v. *Mobile,* 187 U. S. 479, 486; *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Mayor, &c. of Mobile* v. *Eslava,* 9 Port. 577 (Ala.), affirmed, 16 Pet. 234.

There is no question here as to the navigability of the waters surrounding Pinto Island. Mobile Bay, as held by the district court below, although shallow at this point, meets the test of navigability (R. 472). All of the testimony showed that the waters in this vicinity are subject to the ebb and flow of the tide. See, also, *Mayor, &c. of Mobile* v. *Eslava,* 9 Port. 577, 581 (Ala.), affirmed, 16 Pet. 234. Mobile River and Mobile Bay, being navigable tidal waters, the navigable character extends to the whole expanse of such bodies of water independent of the depth. As pointed out by the court below, this is made plain "by the common sense view which permits no distinction upon the ground of navigability between the shallows and depths of navigable waters" (R. 756). Accord, *New York Power & Light Corporation* v. *State,* 230 App. Div. 338, 245 N. Y. S. 44, 49. Cf. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263. See, also, *United States* v. *Banister Realty Co.,* 155 Fed. 583 (E. D. N. Y.), cited by the petitioner (Pet. 36), on the question of title to filled-in land, which decision is to the effect that shoalness of the water near the shore does not affect navigability. The cases cited by petitioner in support of his contention (Pet. 16-18), as pointed out by the court below, "are not at all in point. They had to do not with the shallow

parts of navigable waters but with bodies of water which were held to be non-navigable" (R. 757). "Navigability in fact" of the tidelands is a test having no relevance under the controlling authorities cited above.

Since the island is surrounded by inland navigable waters, it follows of necessity that the State of Alabama became vested with title to the soil underlying the navigable waters upon its admission into the Union in 1819. Furthermore, it has been consistently held in Alabama that in navigable waters, where the tide ebbs and flows, the State's title extends up to ordinary high-water mark, and a conveyance of land bordering navigable tidal waters cannot carry title to land below ordinary high-water mark in derogation of the State's title. *Mobile Transportation Co.* v. *Mobile,* 187 U. S. 479; *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Kennedy* v. *Bebee,* 8 Ala. 909, 913-914, affirmed, 13 How. 25; *Pollard's Heirs* v. *Greit,* 8 Ala. 930, 941; *Magee* v. *Hallett,* 22 Ala. 699, 719-720. Thus, the patent issued by the United States in 1859 to the heirs of Antonio Pinto could operate to convey only land above high-water mark, or 42.75 acres as therein described, which is all it purported to convey.

Petitioner's portion of the island as of the date of the patent, as found by the special master (R. 395), would have been only 1.45 acres. In 1904, when petitioner actually made his purchase, this 1.45 acres had been considerably diminished by erosion (R. 48, 54). Although it was contended by

the United States, and found by the special master (R. 49), that at the time of the filling in of Parcel 2, petitioner had dredged away this fast land and that the filled-in land was located entirely away from the boundaries of the original Pinto Island, the district court found it impossible to make a determination of how much fast land had ever been owned by petitioner and its location with respect to Parcel 2. The court of appeals has now sent the case back to the trial court for a more precise determination of petitioner's fast land, if any.

While the State of Alabama has the power, of course, to dispose of title to lands below high-water mark by express grant, petitioner has shown no express grant of submerged land from the State. On the other hand, the title of the United States stems from an express grant by the State (Govt. Ex. 18, R. 368).

2. Petitioner contends, in the alternative, that he acquired title to Parcel 2 as against the State of Alabama or the United States, as its grantee, by virtue of being a riparian owner. The early Alabama cases cited by petitioner (Pet. 24-28) did not purport to pass upon rights attaching to riparian lands generally as against the State or its grantees. In none of these cases was the State, or a grantee of the State, a party to the action, and hence the question of whether one filling in land under navigable waters could acquire title as against the State could not have been determined. It is not disputed that the cases involved lands which had been filled

in below high tide, but the cases merely held that since plaintiffs' claims were derived through invalid acts of Congress, they could not prevail as against defendants in possession. The cases recognize the principle which became firmly established in *Pollard's Lessee* v. *Hagan,* 3 How. 212, that, as the shore of the navigable waters was vested in the State previous to the filling in, the United States had no power to grant title to such soil owned by the State. Thus, there was no determination of the rights of riparian owners as against the State. In fact, the Alabama court in *Kennedy* v. *Bebee,* 8 Ala. 909, 911-912, affirmed, 13 How. 25, expressly refused to inquire into the extent of such rights and considered what it had said in previous cases as not decisive.

Petitioner accordingly points to no state decision or statute to the effect that a riparian owner acquires title to lands filled in below high-water mark in navigable waters. In the absence of such a showing, the decision of the court below is correct. That court cites its prior decision, *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298, 303, to the effect that filling in submerged lands under navigable tidal waters does not divest the State of title.

The court in the prior decision queried upon what equity the city, as grantee of the State, could be forever debarred from asserting title. The court concluded that neither an alleged immemorial custom to erect wharves nor the payment of taxes nor acquiescence by the city in permitting complain-

ants to fill in the lowlands and construct the wharf and other improvements could have any legal effect against the assertion by the city of its rights. The court said the rights of the public cannot be divested in such manner. Thus, the court denied the right of an owner of upland to acquire title to land below high-water mark in the exercise of the right to wharf out, including filling in, as against the State or its grantee.

Although that declaration of the law of the State of Alabama occurred forty-five years ago, it has never been questioned by either the state legislature or the state courts. On the contrary, that view of the state law is confirmed, in effect, by Title 38, sec. 18(1), Code of Alabama, 1940, providing that title to submerged and reclaimed lands remains in the State until some affirmative action is taken to transfer the title to such lands out of the State.

Petitioner's second contention presents purely a question of state law, a question correctly answered below in a decision which, in any event, is one by a federal court "skilled in the law of" Alabama which this Court is always "hesitant to overrule." *Propper* v. *Clark,* 337 U. S. 472, 486-487, and cases cited.

While petitioner concedes that the United States is not estopped to assert title, citing *United States* v. *California,* 332 U. S. 19, he nevertheless, in his conclusion, emphasizes the fact that the United States did not assert title until after the proceeding in condemnation was instituted. This is not with-

out precedent. *Wittmayer* v. *United States,* 118 F. 2d 808 (C. A. 9). See, also, *United States* v. *San Geronimo Development Co.,* 154 F. 2d 78 (C. A. 1), certiorari denied, 329 U. S. 718; *United States* v. *Chun Chin,* 150 F. 2d 1016, 1018 (C. A. 9).

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions or question which should be decided by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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